UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

GREGORY HARRIMAN, et al.,	)
	)
Plaintiffs	)
	)
v.	) Civil No. 01-148-B-H
	)
UNITED STATES AGRICULTURE SECRETARY, et al.	)
	)
Defendants	)

RECOMMENDED DECISION

This matter is before the court on the Defendant United States of America's motion to dismiss (Docket No. 2) and Defendant Fleet Bank of Maine's similar motion (Docket No. 6). Two additional parties are named as defendants, but they have not filed motions at this time. Based upon my review of the record in this case I recommend that the court **GRANT** both motions.

History of the Litigation[1]

Gregory and Kathryn Harriman first became involved in litigation over their dairy farm in Troy, Maine in November 1995. Fleet Bank of Maine brought an action in Waldo County Superior Court to foreclose the mortgage. The Harrimans stipulated that they were in default on the promissory note held by Fleet and secured by the farm mortgage. Farmer's Home Administration (FmHA), now called Farm Services Agency (FSA), had guaranteed the loan and that guaranty formed a contract between FmHA and Fleet. Pursuant to the terms of the contract Fleet was not to institute foreclosure

[1] The history of this litigation is taken from the Law Court's decision in Fleet Bank Me. v. Harriman,1998 ME 275, 721 A.2d 658, and from prior orders entered by this court relating to the previous complaint. Harriman v. United States Dep't Agric., 99 F. Supp. 2d 105 (D. Me. 2000); Harriman v. United States Dep't Agric., 1999 WL 33208103 (D. Me. 1999) (unpublished disposition).

proceedings until after a determination had been made as to whether the Harrimans qualified for an Interest Rate Buydown Program (IRBP). The Harrimans resisted the foreclosure solely on the grounds that Fleet had not considered them for the IRBP. Both the trial court and the Maine Supreme Court sitting as the Law Court ruled that the Harrimans were neither parties to the guaranty contract nor third party beneficiaries and thus could not avoid the foreclosure on the basis of Fleet's failure to pursue the IRBP. Fleet Bank Me. v. Harriman, 1998 ME 275, 721 A.2d 658. The Law Court's mandate issued December 23, 1998. Id.

Not long thereafter, on February 12, 1999, the Harrimans filed suit in this court against Fleet Bank of Maine, FSA, and the Rural Economic & Community Development Administration (RECDA). See Harriman v. United States Dep't Agric., 99 F.Supp. 2d 105, 106 (D. Me. 2000). The Harrimans collectively identified the governmental entities, the FSA and the RECDA, as the United States Department of Agriculture ("USDA"). (Id.) The Harrimans sought declaratory and injunctive relief in an attempt to prevent the USDA from accelerating the notes and to block Fleet from foreclosing on the farm. (Id.) As an alternative remedy they wanted the farm to be placed into escrow or in a constructive trust until the matter was resolved. (Id.) The Harrimans also requested damages for lost income; the return of their down payment made to Fleet when the loan was first made; and attorney fees and costs. (Id.)

District Court Judge Morton Brody heard and denied the Harrimans' motion for a temporary restraining order. Harriman v. United States Dep't Agric., 1999 WL 33208103 (D. Me. 1999) (unpublished decision). By that time Fleet had foreclosed and Maine's statutory redemption period had expired. Id. at *1 (noting that the Harrimans'

ninety-day period of redemption under Maine law expired on April 7, 1999). Fleet was then dismissed from the lawsuit with the Harrimans' agreement. Harriman, 99 F.Supp. 2d at 106 (citing an order dated May 24, 1999). Arguing sovereign immunity and other grounds, the USDA also moved for dismissal. Id. At this juncture, the Harrimans pressed for both damages and declaratory relief against the USDA. Id. Judge Brody determined that the Harrimans were seeking judicial review of an administrative law decision. Id. He concluded that the USDA had waived the sovereign immunity claim. Id.

Next, this time before Judge Hornby, the Harrimans indicated they no longer were after declaratory relief. Id. The USDA sought summary judgment on the remaining damages claims. Id. The USDA argued that monetary damages were not available pursuant to 7 U.S.C. § 6999 because the judicial review permitted there is limited to non-monetary relief. Id. It also argued that the Tucker Act, 28 U.S.C. § 1346(a)(2) and 28 U.S.C. § 1491(a)(1) could provide the sole other jurisdictional avenue for an award of monetary damage but that that relief was not available to them under that Act for a variety of reasons. The Court agreed with the United States and summary judgment was granted to the defendants and against the Harrimans. Id. at 107-08. Final judgment entered in that case on June 7, 2000.

Sometime in 2000 the Harrimans filed a State court action against Fleet Bank and other individuals seeking, among other things, an extension of the Maine statutory period of redemption beyond the ninety-day period to a one-year period. That lawsuit resulted in another Law Court decision summarily rejecting plaintiffs' claims. Harriman v. Fleet

Bank Me., No. 01-51 (Me. June 14, 2001) (unpublished memorandum of decision at www.cleaves.org).

This fourth piece of litigation in the foreclosure saga commenced on July 24, 2001, when the Harrimans filed this pro se complaint, naming as defendants the USDA and the FSA, the Secretary of Agriculture Veneman, Fleet Bank of Maine, and two attorneys who had appeared in their behalf in the 1999 action. The complaint in this case is captioned "Request for Relief from Judgment or Order" (Docket No. 1) and initially invokes this court's jurisdiction pursuant to 5 U.S.C. § 701 et. seq. as a request for judicial review of agency action. In their prayer for relief the Harrimans ask this court to set aside the order and judgment of foreclosure, restore to them their farm property, and "dismiss" all federal debt. As alternative relief they ask this court to rescind the guaranteed loan contract and return to them the $135,000 down payment with interest, while dismissing all federal debt. Presumably the federal debt references the deficiency owed the United States after the foreclosure. The Harrimans also ask for compensatory and punitive damages from the attorney defendants and from Fleet Bank. Their complaint alleges in paragraphs 44 through 52 that the government agencies, their prior attorneys, and Fleet Bank conspired together to bring about the outcome in the prior federal court litigation and to wrongfully divert monies to the bank.

After receiving the United States' motion to dismiss, the Harrimans clarified their request for relief in their response. (Docket No. 3.) They have indicated that they are not asking this court to grant them relief from the foreclosure entered in state court. Rather, they seek a mandatory injunction requiring the FSA to return their farm property based upon their belief that the FSA acquired Fleet's interest in the property after the

foreclosure. They also dispute the government's assertion that this case is a claim for monetary damages, clarifying that the relief they seek, release from debt, is within the statutory authority of the Secretary of Agriculture pursuant to 7 U.S.C. § 1981(b)(4) and their request for a mandatory injunction ordering the Secretary to release them from debt is equitable relief authorized by 5 U.S.C. § 703. Having explained the history of the litigation between the parties, I will now discuss the two motions pending before the court.

DISCUSSION

1. Defendant Fleet Bank of Maine's Motion to Dismiss

Fleet Bank of Maine asks the court to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12 (b)(6). The argument put forth in its memorandum suggests that res judicata principles dictate this disposition in that the claim in this complaint is alleged to be the precise claim raised by the plaintiffs in their defense of the foreclosure action and further that, to the extent they are pursuing other claims against Fleet, they are precluded from doing so because they had a full opportunity to raise all those claims in the three prior actions between the parties. See Isaac v. Schwartz, 706 F.2d 15 (1st Cir. 1983). The operative facts giving rise to plaintiffs' claims in this case are based upon Fleet's alleged failure to follow federal law in connection with the foreclosure proceedings. That is precisely the claim raised in defense of the state foreclosure action and, again, in the previous case in this court where Fleet was dismissed as a defendant on May 24, 1999. The Harrimans are now precluded from raising any issues actually litigated in the prior suits, Coastal Fuel P.R., Inc. v. Caribbean Petroleum Corp., 175 F.3d 18, 32 (1st Cir. 1999); In re Kaleb D., 2001 ME 55, ¶ 7, 769 A.2d 179, 183, and from

raising any new claims that are part of the same underlying transaction and that could have been brought in those actions, Isaac, 706 F.3d at 16-18. See also Lewis v. Maine Coast Artists, 2001 ME 75, ¶ 9, 770 A.2d 644, 649 ("Claim preclusion prevents relitigation of a claim if: (1) the same parties or their privies are involved in both actions; (2) there is a valid final judgment entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been, litigated in the first.").

According the plaintiffs' complaint the liberal construction granted to pro se pleadings, it might appear that plaintiffs are attempting to allege that Fleet Bank committed some improper conduct in connection with the foreclosure sale itself giving rise to a new cause of action not previously presentable. (Compl. ¶¶ 44 – 52.) If that were so, principles of res judicata would not bar that claim. However, the "facts" put forth in those paragraphs by plaintiffs simply do not support any cause of action against Fleet Bank.

When considering a Rule 12(b)(6) motion to dismiss, the Court must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences in the plaintiffs' favor, and determine whether the complaint, when taken in the light most favorable to the non-movant, sets forth sufficient facts to support the claim for relief. Clorox Co. v. Proctor & Gamble Commer. Co., 228 F.3d 24, 30 (1st Cir. 2000); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998). The Harrimans' "facts" consist of the possibility of "imagin[ing] a deal" (Compl. ¶ 47) between Fleet and the FSA designed to line Fleet's corporate pockets at taxpayers' expense. In support of this allegation the Harrimans incorporate a January 2000 letter from their own attorneys

suggesting that it might be possible for them to negotiate a settlement with Fleet that would result in them receiving approximately $70,000 in cash and a release from all debt. (Compl. ¶ 48). The complaint does not set forth any facts but merely invites the reader to engage in speculation. Such conclusory, speculative allegations do not sustain this claim. See Deft v. Leftridge, 771 F.2d 1168, 1170 (8th Cir. 1985) ("Allegations that a public defender has conspired with judges to deprive an inmate of federally protected rights may state a claim under § 1983. However, allegations of a conspiracy must be pleaded with sufficient specificity and factual support to suggest a 'meeting of the minds.'") (citation omitted); Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977) ("This court has repeatedly held that complaints containing only 'conclusory,' 'vague,' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed. Diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct.") (citations omitted).

Thus plaintiffs' complaint against Fleet Bank should be dismissed under the principles of issue and claim preclusion. To the extent there are claims arising out of the prior lawsuits their statement of these claims fails.

2. United States of America's Motion to Dismiss

In its initial memorandum the United States moved to dismiss this complaint relying upon this court's decision in Harriman, 99 F.Supp. 2d 105. According to the United States the ruling in that prior case established as a matter of law that the Administrative Procedures Act does not allow monetary relief against the United States because there has been no waiver of sovereign immunity. As the Harrimans seek a dismissal of all federal debt as affirmative relief in the present lawsuit, the United States

initially argued that cancellation of the Harrimans' debt would be income to them and thus a monetary award against the government prohibited under the doctrine of sovereign immunity.

After the Harrimans attempted to clarify their position in their response (Docket No. 3), indicating that they sought a mandatory injunction against the Secretary of Agriculture, the United States filed a reply raising new grounds for dismissal (Docket No. 5). The United States convincingly points out that the injunctive relief that the Harrimans now claim they seek, compelling FSA to return their farm property, is impossible. The complaint makes clear that Fleet was the mortgagee of this property and that the property was conveyed to a third party as a result of the foreclosure sale. (Compl. ¶¶ 35, 36, 47, and 48.) The only suggestion in the complaint and attached exhibits that the government itself might have held some of the Harrimans' property relates to Exhibit 43 (Compl. ¶ 42), a letter discussing the government's security interest in certain personal property. Harrimans' complaint clearly seeks return of the real estate, not miscellaneous personal property. As the allegations establish conclusively that the United States never owned the real estate, the complaint fails to state a claim supporting a request for a mandatory injunction that the Secretary reconvey the property to the Harrimans.

Harrimans' second tier of requested relief involves obtaining a mandatory injunction against the Secretary of Agriculture compelling her to dismiss all federal debt. The United States acknowledges that there is a mechanism pursuant to 7 U.S.C. § 1981(b)(4) that authorizes the secretary to "compromise, adjust, reduce, or charge-off debts or claims." An applicant whose debt settlement request is denied can appeal the administrative decision pursuant to the Administrative Procedures Act. This exhaustion

is a mandatory prerequisite to judicial review. See 7 U.S.C. § 6912(e) ("Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against--(1) the Secretary; (2) the Department; or (3) an agency, office, officer, or employee of the Department."); Gleichman v. United States Dep't Agric., 896 F.Supp 42, 43-44 (D. Me. 1995) ("It is hard to imagine more direct and explicit language requiring that a plaintiff suing the Department of Agriculture, its agencies, or employees, must first turn to any administrative avenues before beginning a lawsuit."). Ultimately a final agency decision could become subject to judicial review. However, plaintiffs do not allege that they ever made a request pursuant to 7 U.S.C. § 1981(b)(4) that the Secretary compromise this debt, let alone claim that the Secretary denied the request and that they have exhausted the administrative process in this regard. For these reasons their complaint fails to state a claim against the governmental defendants as well.

Conclusion

Based upon the foregoing, I recommend that the court **GRANT** the motions to dismiss brought by both Fleet Bank of Maine and the United States Department of Agriculture

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive

memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____

Margaret J. Kravchuk
U.S. Magistrate Judge

November 6, 2001

STNDRD

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-148

HARRIMAN, et al v. AGRICULTURE, US SEC, et al Filed: 07/24/01

Assigned to: JUDGE D. BROCK HORNBY

Demand: $0,000 Nature of Suit: 290

Lead Docket: None Jurisdiction: US Defendant

Dkt# in other court: None

Cause: 18:4208(B) Agency Action Review

GREGORY A HARRIMAN GREGORY A HARRIMAN

plaintiff [COR LD NTC] [PRO SE]

111 RAVEN HILL RD, DIXMONT, ME 04932, (207) 234-4241

KATHRYN P HARRIMAN KATHRYN P HARRIMAN

plaintiff [COR LD NTC] [PRO SE]

111 RAVEN HILL RD, DIXMONT, ME 04932 (207) 234-4241

v.

AGRICULTURE, US SEC FREDERICK EMERY

defendant 780-3258

[COR LD NTC]

OFFICE OF THE U.S. ATTORNEY

P.O. BOX 9718, PORTLAND, ME 04104-5018, (207) 780-3257

AGRICULTURE, US DEPT FREDERICK EMERY
defendant (See above)
[COR LD NTC]

FLEET BANK OF MAINE
defendant

CARL MCCUE PETER J. DETROY, III
defendant 774-7000
[COR LD NTC]
NORMAN, HANSON & DETROY, 415 CONGRESS STREET
P. O. BOX 4600 DTS, PORTLAND, ME 04112 774-7000

DAVID VAN DYKE PETER J. DETROY, III
defendant (See above)